Supreme Court, U.S.
FILED
NOV 5 1992
OFFICE OF THE CLERK

(5)

No. 92-255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,
Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S PRECEDENTS AND ENDORSES A DANGEROUS DOCTRINE CURTAILING FUNDAMENTAL RIGHTS OF UNITED STATES CITIZENS IN THE TERRITORIES	1
II. THE LOWER COURT DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT INTERNATIONAL OBLIGATIONS MAY EXCUSE INFRINGEMENTS OF FUNDAMENTAL RIGHTS	5
III. ARTICLE XII CREATES A RACIAL CLASSIFICATION	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Balzac v. Porto Rico, 258 U.S. 298 (1922)	2
Boos v. Barry, 485 U.S. 312 (1988)	5-6
Downes v. Bidwell, 182 U.S. 244 (1901)	2
Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976)	2,3-4
In re Burt, 737 F.2d 1477 (7th Cir. 1984)	6
Morton v. Mancari, 417 U.S. 535 (1974)	9-10
Oyama v. California, 332 U.S. 633 (1948)	3
Reid v. Covert, 354 U.S. 1 (1957)	4,6
Sahagian v. United States, 864 F.2d 509, (7th Cir. 1988), *cert. denied* 489 U.S. 1087 (1989)	6
Terrace v. Thompson, 263 U.S. 197 (1923)	3
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)	3
Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990)	3

CODES

Covenant to Establish a Commonwealth in Political Union with the United States of America, "Covenant", *reprinted as amended in* 48 U.S.C.A. § 1681 (West 1987)	*passim*

OTHER AUTHORITIES

Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention; Briefing Paper No. 12, Restrictions on Land Alienation 10 n.5 (1976)	7
Constitution of the Commonwealth of the Northern Mariana Islands, Article XII	*passim*

Table of Authorities Continued

	Page
Liebowitz, *Defending Status: A Comprehensive Analysis of United States Territorial Relations* at 592 (1989)	7
S. Rep. No. 433, 94th Cong., 1st Sess. at 89 (1975)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-255

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,
Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S PRECEDENTS AND ENDORSES A DANGEROUS DOCTRINE CURTAILING FUNDAMENTAL RIGHTS OF UNITED STATES CITIZENS IN THE TERRITORIES

Respondents' brief fails to reconcile the Ninth Circuit's decision in this case with the Insular Cases and their progeny. Brief of Respondents in Opposition ("Resp. Br.") at 17-24. The *Insular Cases* stand

squarely for the proposition that fundamental rights apply with full force in United States territories and possessions. *Downes v. Bidwell*, 182 U.S. 244, 283-84 (1901); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922). In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), this Court confirmed that the guarantee of equal protection is a fundamental right that extends even to aliens in Puerto Rico. Indeed, the rights that have been deemed "non-fundamental" and therefore optional in the territories under this Court's jurisprudence have been exclusively procedural rights or institutional arrangements of uniquely Anglo-Saxon origin. By contrast, the right to be free of invidious racial discrimination is a substantive right that is fundamental to free government and is universally acknowledged in free nations. *See* Brief of Amicus Curiae InterPacific Resorts (Saipan) Corporation ("InterPacific Amicus Br."), at 10-11 nn.6, 7, and cases and authorities cited therein.

Further, equal protection guarantees have been held applicable in the territories regardless of any constitutional entitlement to engage in a particular activity. *Flores de Otero*, 426 U.S. at 572. This Court has recognized consistently that the right to be free of invidious discrimination extends across the full spectrum of human activities—*e.g.*, sitting at a particular public lunch counter, working as an architect, or owning land—regardless of any constitutional entitlement (or lack thereof) to engage in the activity itself. *See* Petition for Writ of Certiorari ("Pet.") at 14-16, and cases cited therein.

Respondents cite authorities upholding restrictions on aliens' rights, Resp. Br. at 19-23. These precedents

are inapposite here since, as respondents acknowledge, the petitioner is a citizen of the United States. Resp. Br. at 20 n.15.[1]

Respondents offer no support for their and the Ninth Circuit's unprecedented conclusion that application of equal protection doctrine to the territories "must be on a case-by-case basis in order to 'accommodate the unique social and cultural conditions and values of the particular territory' under consideration." Resp. Br. at 23, quoting *Wabol v. Villacrusis*, 958 F.2d 1450, 1460 (9th Cir. 1990) reprinted in Petition for Writ of Certiorari, Appendix ("Pet. App.") at 23. The only authority respondents advance for this dubious requirement, the *Flores de Otero* case, stands, in fact, for the opposite proposition. There, this Court recognized that the Equal Protection clause applies categorically in the Commonwealth of Puerto Rico. Analysis of Puerto Rico's special situation was properly conducted as part of equal protection scrutiny, not in place of it. And the analysis offered there was searching and factual, in contrast to the cursory and deferential rationalization offered by the Ninth

---

[1] Thus, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court declined to extend Fourth Amendment protections to a search of an alien residence in a foreign land. But this decision offers no support for respondents' theory that constitutional protections may be withheld from U.S. citizens living in a Commonwealth of the United States. *See* Resp. Br. at 19. Likewise, in *Terrace v. Thompson*, 263 U.S. 197 (1923), this Court countenanced restrictions on alien land ownership, but without endorsing state-mandated restrictions on U.S. citizens' rights. Respondents' reliance on *Oyama v. California*, 332 U.S. 633 (1948), is startling since the Court there *struck down* a state law which restricted land ownership on the basis of alienage. *See* Resp. Br. at 20.

Circuit in this case. See *Flores de Otero*, 426 U.S. at 604-06.

The Ninth Circuit's opinion departs from this Court's precedents and would establish a dangerous new rule: that the United States government may dispense with the most basic rights of U.S. citizens by mutual agreement with another sovereign or semi-sovereign entity. The Ninth Circuit's endorsement of a racial classification here stands as an invitation to its expanded use in future agreements with the territories such as Guam. Pet. at 17-18 n.10. Further, the same logic which supports land alienation restrictions here would support curtailment of free speech, arrest without cause, detention without trial, taking without compensation, and so forth in the territories, whenever vaguely defined considerations of "national interest" or "foreign policy" are advanced in connection with an ill-conceived "international obligation" of the United States. Indeed, the respondents' and the Ninth Circuit's argument logically would support negotiated curtailments of U.S. citizens' civil liberties in foreign lands as well. *Contrast, e.g., Reid v. Covert*, 354 U.S. 1 (1957) (U.S. citizens enjoy constitutional protection overseas). Such a precedent should not stand.

History teaches that racial classifications often are the remedy of choice but seldom solve the problems used to justify them. NMI's racial landholding restriction is a case in point. The Covenant negotiators chose to take the easy route of racial preference rather than confront the complex issues that every society faces in deciding the amount and level of acceptable economic development and change. The classification used here was neither necessary nor

sufficient to achieve the goal of protecting culture and traditions. Indeed, respondents never were asked to show that racial discrimination would substantially advance goals of protecting NMI culture and traditions. Nor could respondents have shown such a relationship. InterPacific Amicus Br. at 15-19. To the contrary, respondents' brief eloquently portrays the arbitrariness and ineffectiveness of the racial restriction in attempting to preserve traditional ways. *See* Resp. Br. at 26-27 (noting open door policy and rapid economic developments and commercialization of NMI).

Proper equal protection scrutiny would have revealed that race-neutral alternatives—including a zoning plan or other limitations on the sale, lease, or development of land—would have worked more effectively in protecting indigenous family structures, culture and mores. By disdaining such analysis, the Ninth Circuit not only departed from the precedents of this Court and established a dangerous new precedent; the court failed to advance the stated goals of the restriction. Simple adherence to this Court's precedents would have avoided this perverse result.

II. THE LOWER COURT DEPARTED FROM THIS COURT'S PRECEDENTS IN HOLDING THAT INTERNATIONAL OBLIGATIONS MAY EXCUSE INFRINGEMENTS OF FUNDAMENTAL RIGHTS

Contrary to both the Ninth Circuit and the Respondents, the Bill of Rights limits the Government's authority to enter into agreements even when the other party is another sovereign nation. *See Boos v. Barry*, 485 U.S. 312, 324 (1988) (" 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which

is free from the restraints of the Constitution' "), quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957); *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988), *cert. denied*, 489 U.S. 1087 (1989); *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984).

Moreover, the restriction here is not part of an "international obligation" of the United States. As respondents acknowledge, the Covenant is an instrument of political union, not a treaty, by which "the Northern Marianas became part of the United States of its own free will, freely expressed, and not an acquired possession, like Guam. . . " Resp. Br. at 7 n.6; *see also* Covenant To Establish a Commonwealth in Political Union with the United States of America ("Covenant") § 903, *reprinted as amended in* 48 U.S.C.A. § 1681 (West 1987). There is no support in this Court's precedents for the notion that Congress may create a political union between NMI and the United States, with the NMI under its sovereignty, but deny United States citizens there the fundamental guarantee of equal protection of the laws.

Respondents raise the specter of the Covenant unraveling as a result of any finding that Covenant § 805 is unconstitutional. Resp. Br. at 10-11, 28. Even if this were a real prospect, it would not necessarily excuse a denial of U.S. citizens' fundamental rights in the NMI. *See* § I, *supra*. Nor does the record justify the lower court's evident assumption that the US-NMI relationship somehow would come unglued as a result of a court-ordered modification to conform the Covenant and the Constitution of the Northern Mariana Islands to the Constitution of the United States.

In fact, the NMI was well aware of the possibility that the land alienation restrictions mandated by Cov-

enant § 805 and Article XII of the NMI Constitution might be challenged in federal courts and ultimately held unconstitutional. *See generally* Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention; Briefing Paper No. 12, Restrictions on Land Alienation at 10 n.5 (1976) ("Section 501 attempts to insulate § 805 from the effects of otherwise applicable portions of the United States Constitution but it is not clear that the courts will give effect to § 501 because American courts are reluctant to exempt American governments from limitations on their own powers."); Covenant § 903 ("Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States").

Moreover, although the legislative history indicates that the United States thought the land alienation restriction was important, the NMI negotiators evidently did not consider it fundamental and questioned the wisdom of making it mandatory. *See* Liebowitz, *Defending Status: A Comprehensive Analysis of United States Territorial Relations* at 592 (1989); InterPacific Amicus Br. at 18-19. Despite self-serving language in the Covenant, *see* Covenant § 105, one must view with skepticism any claim that the land alienation restriction was "fundamental" to the NMI. NMI's acknowledged open door development policy raises further doubts as to its commitment to the "fundamental" goals of § 805. Resp. Br. at 26-27. In any case, proper equal protection scrutiny would have enabled the lower court to explore the impact of a court-ordered modification on the U.S.-NMI relationship, and weigh that impact, if any, against petitioner's equal protec-

tion interests. The lower court's error lay in failure to conduct such scrutiny.

III. ARTICLE XII CREATES A RACIAL CLASSIFICATION

There is no merit in respondents' argument that the definition of "person of Northern Marianas descent" does not embody a racial classification. Resp. Br. at 11-17. The language of Article XII of the Constitution of the Commonwealth of the Northern Mariana Islands implementing Covenant § 805 ("Article XII") is plainly cast in racial terms. The negotiating history of the Covenant acknowledges that the classification was intended to be based on ancestry. S. Rep. No. 433, 94th Cong., 1st Sess. at 89 (1975) ("Under this section [Covenant § 805] the Government of the Northern Mariana Islands and [sic] until 25 years after the termination of the Trusteeship [will] regulate the alienation of permanent and long-term interests in property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent, *i.e.*, of Chamorro or Carolinian ancestry.").

The legislative history of Article XII reveals that, prior to 1966, only indigenous Chamorros or Carolinians qualified for trust territory citizenship and only such persons met the Article XII test. Resp. App. at 129a. Moreover, NMI-person status is passed on strictly by circumstances of birth or adoption. Resp. App. at 127a. Thus, children may be citizens of any country, and live anywhere, so long as they descend from "a person of Northern Marianas descent." Yet, a person whose parents are not 25% NMI person, on average, *e.g.*, a person of Palauan descent, will be ineligible to own land in the NMI, no matter what her citizenship or how long she has lived in the NMI.

See Resp. App. at 127a. In operation, the definition of "person of Northern Marianas descent" is clearly based on ancestry.[2]

As respondents point out, petitioner is a corporate citizen of the United States. Resp. Br. at 20 n.15. Like many other United States citizens in the NMI, petitioner is denied an equal status in the community because its shareholders and directors do not have the correct ancestry.

Respondents merely grasp at straws in suggesting that the racial classification in Article XII is somehow justified by analogy to special employment rules for members of Indian tribes "whose lives and activities are governed in a unique fashion." Resp. Br. at 16 (quoting *Morton v. Mancari*, 417 U.S. 535, 554 (1974)). *Mancari* involved an employment preference for Indians where "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . " *Id.* at 554. Moreover, the limited employment preference was directed to participation by the governed in their government (the Bureau of Indian Affairs). Here, by contrast, "persons of NMI descent" are not governed in a manner distinct from those not of NMI descent, and the privileged "persons of NMI descent" are not

---

[2] Respondents' argument that the restriction excludes Chamorros and Carolinians who live in Guam and the Federated States of Micronesia, as well as excluding long-term Commonwealth residents belonging to the non-privileged "polyglot population of the Commonwealth", merely demonstrates that the classification is both arbitrary and racial. Resp. Br. at 15. Certainly a restriction that applies to all members of race X who are residents of State Y is a race-based restriction. That it does not include members of race X who may live in other states does not remove the racial taint.

necessarily members of any "tribal entity" or community there. *Mancari* offers no shelter for the discriminatory purpose and impact of Covenant § 805 and Article XII which implements it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950